IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2019-CA-01606-COA

ELTON HARTZLER **APPELLANT**

v.

RANDY BOSARGE **APPELLEE**

DATE OF JUDGMENT:	10/09/2019
TRIAL JUDGE:	HON. KATHY KING JACKSON
COURT FROM WHICH APPEALED	JACKSON COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	DOUGLAS LAMONT TYNES JR.
ATTORNEYS FOR APPELLEE:	JAMES H. HEIDELBERG APRIL LEIGH McDONALD
NATURE OF THE CASE:	CIVIL - CONTRACT
DISPOSITION:	REVERSED AND RENDERED - 03/16/2021
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

McCARTY, J., FOR THE COURT:

¶1. A homeowner hired a contractor to renovate a home in Ocean Springs. The homeowner later filed suit against the contractor, alleging the construction was faulty and that he needed to hire other workers to correct the issues. The parties agreed to submit the matter to binding arbitration in accord with their contract, and the homeowner was awarded damages and attorney's fees.

¶2. The homeowner sought to confirm the award in circuit court, and it was duly entered. Over a year after its confirmation, the contractor sought to have the court's judgment modified. He argued that the judgment was only against his company, and not him individually. Finding his arguments persuasive, the circuit court modified the judgment to

release the contractor from the judgment.

¶3. The homeowner appealed. Finding that the circuit court exceeded its jurisdiction in modifying the arbitration award, we reverse and render.

BACKGROUND

¶4. The facts and procedural posture of this case are not in dispute. In 2007, Elton Hartzler entered into a Contractor Agreement with "Randy Bosarge of Superior Builders & Developers Inc." Bosarge is the president of Superior Builders. Hartzler hired him to work on a house in Ocean Springs.

¶5. About three years later, Hartzler filed a lawsuit against "Randy Bosarge d/b/a Superior Builders and Developers." In his complaint, he alleged Bosarge's substandard renovations not only breached "building codes," "industry standards," and "flood insurance requirements," but also caused him to incur additional costs to reverse the damages. The homeowner ultimately alleged the constructor was liable for breach of contract, breach of warranty, and negligent construction.

¶6. The defendant responded with a motion to send the case to arbitration. Using the singular, the relief was sought by "Defendant Randy Bosarge d/b/a Superior Builders and Developers." The motion requesting arbitration was signed by counsel under the party line "Randy Bosarge, Individually and d/b/a Superior Builders and Developers." The defendant argued that the contract between the two required arbitration if a dispute arose over the contract. As a result, the parties ultimately agreed to dismiss Hartzler's initial suit and arbitrate the case instead.

¶7. An arbitration hearing was held seven years later. On June 13, 2017, the arbitrator found in Hartzler's favor and ruled that he was entitled to recover an interim award of $67,009.12. On August 21, 2017, the arbitrator issued the homeowner a final arbitration award in the amount of $100, 513.68, which included attorney's fees, plus eight percent "due on any amount not paid within fourteen (14) days of this Final Award." Both the interim and the final arbitration awards listed the defendant as "Randy Bosarge d/b/a Superior Builders and Developers, Inc.," and referred to the defendant in the singular as "Bosarge."

¶8. Award in hand, Hartzler next sought to confirm it in circuit court. On April 13, 2018, the circuit court entered an order confirming the final arbitration award. On April 30, 2018, the circuit court entered a judgment consistent with the final arbitration award. The judgment held "that Plaintiff Elton Hartzler takes a Judgment of and from Randy Bosarge/Superior Builders & Developers, Inc. for the sum and amount of $100,513.68 with interest at the rate of eight percent due on any amount not paid within fourteen (14) days of the Final Arbitration Award dated August 21, 2017, plus all taxable court costs. Interest will continue to accrue until this Judgment is paid in full."

¶9. A little less than a year later, on April 25, 2019, Hartzler filed a suggestion for a writ of garnishment on the judgment against "Randy Bosarge/Superior Builders and Developers," who was again referred to as the singular "Defendant." The circuit court issued a writ of garnishment that same day.

¶10. One full year after the judgment against him was entered, Bosarge filed a motion to quash the garnishment and modify the judgment. For the first time, Bosarge argued that the

judgment was not entered against him personally, but only against "Randy Bosarge/Superior Builders and Developers." The better part of a decade after litigation began, and a year after judgment was entered in the case, Bosarge argued that he should not be bound by the arbitration award or the circuit court's confirmation of it.

¶11. Ultimately, after hearing arguments from the parties and reviewing the evidence, the circuit court agreed with Bosarge, and over a year after the original judgment confirming the arbitration award, removed Bosarge, in his individual capacity, from the judgment. The circuit court's order clarified that Hartzler "is entitled to Judgment from Superior Builders and Developers" but that Bosarge "is not and was not a party to the lawsuit or to the arbitration proceeding which led to the judgment, therefore the judgment does not apply to him."

¶12. Hartzler timely filed his notice of appeal from the trial court's modification of the judgment. He argues four points of error: (1) that the circuit court lacked jurisdiction to rule on Bosarge's motion to modify the judgment, (2) that the court likewise lacked jurisdiction to modify the arbitration award, (3) that Bosarge should not have been able to attack the judgment over a year later, and (4) that the circuit court erred in determining that Bosarge, individually, was not a party to the Contractor Agreement.

STANDARD OF REVIEW

¶13. The Mississippi Supreme Court has held that "the scope of judicial review of an arbitration award is quite narrow, and 'every reasonable presumption will be indulged in favor of the validity of arbitration proceedings.'" *D. W. Caldwell Inc. v. W.G. Yates & Sons*

Constr. Co., 242 So. 3d 92, 98 (¶13) (Miss. 2018) (quoting *Wilson v. Greyhound Bus Lines Inc.*, 830 So. 2d 1151, 1155 (¶9) (Miss. 2002)).

DISCUSSION

¶14. Our review of this appeal is fully controlled by and fundamentally similar to the Supreme Court's decision in *Caldwell v. Yates*, *supra.* That case contains the required procedure we should use when analyzing whether an arbitration award is subject to modification.

¶15. In *Caldwell*, a subcontractor clashed with its general contractor over the work on a roof at Auburn University. *Id*. at 95-96 (¶¶4-5). The two companies went to arbitration, and the subcontractor prevailed. *Id.* at 96 (¶5). The general contractor asked the arbitrator to reconsider—a request that was "summarily dismissed by the arbitrator." *Id*. The subcontractor then asked the circuit court to confirm the award. *Id*.

¶16. During the proceedings to confirm the arbitration award, "the trial court allowed the parties to introduce evidence and witness testimony." *Id*. at 96-97 (¶¶7-8). "Ultimately, the trial court reviewed fourteen exhibits and the testimony of one witness in making its decision." *Id*. at 97 (¶6). The trial court found that the arbitration award had been wrongly calculated by the arbitrator, and "amended the award, reducing the total by $104,507." *Id*. But the Supreme Court reversed, rejecting both the process of confirmation used by the trial court and its findings of a miscalculation in the award. *Id*.

¶17. The Court first looked at the controlling law. The same code sections apply in this case as in *Caldwell*: construction contracts which "apply to any agreement for the planning,

design, engineering, construction, erection, repair or alteration of any building, structure, fixture, road, highway, utility or any part thereof . . . ." *Id*. at 98 (¶12) (citing Miss. Code Ann. § 11-15-101(2) (Rev. 2012)). Guiding its analysis under that statute, the Court then called attention to the strict and binding nature of arbitration proceedings in general. *Id*. It explained that because the proceedings are so final and binding, trial courts must be careful to "review, confirm, or modify" all arbitration awards through an "extremely limited lens." *Id*. at 98 (¶13).

¶18. The Court went on to specify that the applicable statute which governs award modification is a part of that limited and narrow "lens." *Id*. In fact, that statute, along with its sister federal statute, are the *only* means by which an arbitration award can be modified. *Id*. The *Caldwell* Court specifically declared that "a circuit court has *no authority* to modify a construction-related arbitration award unless the exceptions outlined under" the statute apply. *Id*. (emphasis added).

¶19. Applying the rules above, the Court held the circuit court erred in finding a miscalculation existed. *Id*. at 100 (¶20). First, the Court reasoned that because a circuit court's review of arbitration awards is limited, "evident" mistakes "must be apparent from *nothing more* than the four corners of the award and the contents of the arbitration record." *Id*. (emphasis added). In other words, a circuit court must confine itself to the four corners of the award and the arbitration record, because "[l]ooking to evidence beyond 'the face' of the award or the arbitration record allows the parties an opportunity to retry the matter in front of a trial judge," which "diminish[es] the binding nature and finality of arbitration

proceedings[.]" *Id*. at 100-01 (¶20).

¶20. The Supreme Court added that because parties are bound to the face of the award and the contents of the prior record, they should not be allowed "to present new evidence or witness testimony." *Id*. at 101 (¶20). This careful limitation follows the clear intent of the statute to favor the finality of arbitration: "By limiting the trial court's review to the arbitration award and the arbitration record alone, we ensure the integrity of arbitration proceedings will endure, preserving parties' right to review under the statute." *Id*. at (¶22).

¶21. As a result, the Court fenced off future circuit courts from expanding an existing record to support modification, since a court "may not consider . . . witness testimony garnered during the trial court's hearing[.]" *Id*. at 102 (¶24). When a court considers evidence of this type, it "exceed[s] its jurisdiction by assuming the role of factfinder and reviewing witness testimony outside the arbitration record to determine where and to what extent a miscalculation existed." *Id*. at 103 (¶23).

¶22. Finally, the *Caldwell* Court emphasized why modification must be premised on the face of an award instead of on later developed legal theories: "To do otherwise would be to open the door to the boundless legal and evidentiary appeals that can render informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process, and bring arbitration theory to grief in post arbitration process." *Id*. at 103 (¶30) (cleaned up). This is "[b]ecause arbitration is meant to *supplant* litigation, not *supplement* it[.]" *Id*. at 104 (¶31) (emphases added).

¶23. Under these rationales, the Supreme Court rejected the general contractor's claims that

the arbitration award was "miscalculated" based on the face of the award and the record. *Id*. at 104 (¶29). The Court ultimately found the trial court "abused its discretion by allowing witness testimony during the award-confirmation hearing, resulting in plain error by the court." *Id*.

¶24. In applying *Caldwell* to the appeal here, we will see the modification of the arbitration award does not meet the requirements set by the Court. The modification goes beyond the face of the arbitration award to find "an evident mistake in the description of any person," which was based on information not found on the face of the award or in the contents of the arbitration record. The modification of the arbitration award also violated the strict timelines set out by the Legislature as to when a party may seek to modify an arbitration award. Finally, the untimely modification violated public policy by allowing this case to be litigated well beyond the close of arbitration.

I. The identity of the defendant was not an "evident mistake" warranting modification.

¶25. There was simply no "evident mistake" apparent from the four corners of the arbitration award that warranted modification. The award itself clearly set out who was subject to the judgment, the circuit court confirmed that award as written, and then entered the judgment based upon those written findings. The absence of an "evident mistake" is clear—especially when recognizing that under the facts of this case there is no clear legal distinction between "Bosarge" and "Bosarge d/b/a Superior Builders and Developers."

¶26. As plainly stated by the Legislature, the only way an arbitration award can be modified is if "[t]here is an evident miscalculation of figures" or "an evident mistake in the

description of any person, thing or property referred to in the award." Miss. Code Ann. § 11-15-135(1)(a) (Rev. 2019). "Evident" under the statute means one which is "plain, obvious, or clearly understood," and "must be apparent from *nothing more* than the four corners of the award and the contents of the arbitration record." *Caldwell*, 242 So.3d at 100 (¶20) (emphasis added).

¶27. In other words, the only way the arbitration award could be modified in this case is if there is an "evident mistake" in the interpretation of the defendant's identity—"Bosarge" versus "Bosarge d/b/a Superior Builders." Yet there was simply nothing in either the interim or final award which constitutes an "evident mistake" as to the identity of the defendant.[1]

¶28. The interim award of the arbitrator described the background of the dispute. The award read, "The proof revealed that this arbitration arises out of claims asserted by Elton Hartzler against his home builder, Randy Bosarge/Superior Builders and Developers, Inc. (hereinafter referred to as 'Bosarge') for alleged defective construction and alleged overcharges." Throughout the Interim Award, the defendant is referred to only as "Bosarge." The arbitrator overwhelmingly found in favor of Hartzler and ruled that "the interim award in this case is that Hartzler shall recover *from Bosarge* the sum of $67,009.12, which sum is hereby awarded to Elton Hartzler." (Emphasis added).

¶29. The Interim Award was signed on June 13, 2017, and was subject to subsequent amendment because the arbitrator was allowing costs and expenses and answering special

[1] While *Caldwell* expressly allows a circuit court to peer into the "four corners of the award and the contents of the arbitration record," in this case the arbitration record was not made part of the circuit court file. Therefore the only material the circuit court could review was the Interim Award and the Final Award.

interrogatories. Neither Bosarge nor Superior Builders asked for any sort of change in the way the defendant was addressed, or in the relief fashioned against the defendant in the Interim Award.

¶30. In the Final Award, the arbitrator considered the "response of Randy Bosarge/Superior Builders and Developers, Inc. (hereinafter referred to as 'Bosarge') to the Hartzler submission" of requests for attorney's fees. The arbitrator found that "Hartzler is clearly the prevailing party for attorneys' fees award because the preponderance of the evidence, which can come from either or both parties' evidence (which in this case is both), proves that Bosarge breached the parties' contract and was negligent, causing damages to Hartzler." The arbitrator further awarded the sum of over $33,000 in attorney's fees to Hartzler for his losses.

¶31. The Final Award was signed August 21, 2017. Yet again, neither Bosarge nor Superior Builders asked for any change in the way the defendant was addressed or in the relief fashioned against the defendant in the Final Award.

¶32. In November 2017, Hartzler filed a motion to confirm the arbitration award with the Jackson County Circuit Court. Neither Bosarge nor Superior Builders asked for any change in the way the defendant was addressed or in the relief fashioned against the defendant in the request to confirm the arbitration award.

¶33. On April 13, 2018, the trial court entered an order confirming the arbitration award and entering judgment against the defendant. Neither Bosarge nor Superior Builders asked for a change in the way the defendant was addressed, or in the relief fashioned against the

defendant in this order.

¶34. Finally, on April 30, 2018, the trial court entered a judgment granting Hartzler a confirmation of the award and damages "from Randy Bosarge/Superior Builders & Developers, Inc." Once more, neither Bosarge nor Superior Builders asked for any sort of change in the way the defendant was addressed, or in the relief fashioned against the defendant in the Judgment.

¶35. However, on April 30, 2019—*one year* later, and after Hartzler attempted to collect his damages against him, Bosarge leapt into action to correct what he termed "error" in the arbitration award. However, there is nothing on the face of the arbitration award which suggested that enrolling the judgment against Bosarge individually was error in any way, let alone an "evident mistake."

¶36. Because there was no evident mistake, the circuit court's modification of the order was clear error under *Caldwell*'s interpretation of the relevant arbitration statutes. This requires reversal and rendering to reinstate the original judgment confirming the arbitration award.

¶37. That Bosarge was personally subject to the judgment for the arbitration award can also not be disputed at this late date, since on the record before us there is no legal distinction between him individually and his "doing business as" business name of Superior Builders. The arbitrator correctly assumed this point without elaboration, as did the parties, including Bosarge.

¶38. While Mississippi precedent does not directly tackle this issue, other jurisdictions have

held the "d/b/a" description is simply an alias for the individual. *See S. Ins. Co. v. Consumer Ins. Agency Inc.*, 442 F. Supp. 30, 31 (E.D. La. 1977). As one court ruled, "[u]se of a fictitious business name does not create a separate legal entity." *Pinkerton's Inc. v. Superior Court*, 49 Cal. App. 4th 1342, 1348 (1996). Using "d/b/a" does not create some magical distinction between the individual and the company "but is merely descriptive of the person or corporation who does business under some other name." *Id*. (Internal quotation marks omitted). "Doing business under another name does not create an entity distinct from the person operating the business." *Id*.

¶39. In other words, regardless of whether the arbitration award stated Bosarge, individually, or "Bosarge d/b/a Superior Builders," the award was always against Bosarge because there is no legal distinction between the two names.

¶40. In a case very similar to this one, an appellate court upheld an arbitration award against an individual who also had a "d/b/a" company. *Jaffe v. Nocera*, 493 A.2d 1003, 1007 (D.C. 1985). "By captioning the respondent in his demand for arbitration as 'Ronald Mickey Nocera d/b/a [corporate entities],'" the plaintiff in the case "put Nocera on notice that he interpreted the contract to include Nocera individually as a party, and that he intended to attempt to hold Nocera personally liable for the amount owing under the contract." *Id*.

¶41. Critically, that court found that "[t]he corporate name following the designation d/b/a ('doing business as') is 'merely descriptive' of Nocera." *Id*. at 1007-08. For "an individual actually doing business this way remains one person, personally liable for all his obligations." *Id*. at 1008 (citation and internal quotation marks omitted). The appeals court further found

that "the d/b/a designation in Jaffe's demand for arbitration put Nocera and his attorney on notice that Jaffe was requesting an arbitration of a dispute between himself and Nocera personally, pursuant to Jaffe's interpretation of the contract." *Id.*; *see also Rottlund Co. v. Scott Larson Const. Inc*., No. Civ. 02-1238, 2004 WL 742054, at *3 (D. Minn. Mar. 4, 2004) ("The individual who does business . . . under one or several names remains one person, personally liable for all his obligations").

¶42. Under the limited record before us, and under the unique procedural and factual posture of this case, "Randy Bosarge, d/b/a Superior Builders" is equivalent to the individual Randy Bosarge. There was therefore no "evident mistake" in the arbitration award against Bosarge. The arbitration award was legally correct and in any event there was not proof on the face of the arbitration awards of an "evident mistake" which would have allowed modification.

¶43. Because the trial court went beyond the face of the arbitration award, the circuit court exceeded its jurisdiction. This error requires reversal.

II. Proof outside of the arbitration award or record may not be heard.

¶44. The Supreme Court in *Caldwell* also banned parties from creating new grounds in the circuit court to attack an arbitration award. In turn, the Court precluded circuit courts from considering "witness testimony garnered during the trial court's hearing" or attempting "to enter into a fact-finding position, not appropriate under such circumstances." *Caldwell*, 242 So. 3d at 102 (¶24). When a court considers evidence of this type, it "exceed[s] its jurisdiction by assuming the role of factfinder and reviewing witness testimony outside the

arbitration record to determine where and to what extent a miscalculation existed." *Id*. at 103 (¶29); *cf*. *Griffin v. State*, 824 So. 2d 632, 635 (¶7) (Miss. Ct. App. 2002) (in general "[i]ssues raised for the first time on appeal are procedurally barred from review as they have not been first addressed by the trial court").

¶45. While not as overtly as in *Caldwell*, where there was renewed proof put on about the price of the dormitory roof at Auburn, here the contractor presented entirely new arguments before the circuit court which were never previously raised before the arbitrator. As set out above, the arbitrator at all times referred to Bosarge and his company by the individual name Bosarge, as had the circuit court pleadings. Bosarge never corrected this point or argued he should not be individually bound to the construction contract.

¶46. Yet in seeking to quash the garnishment at the circuit court level *after* Hartzler attempted to collect damages against him, Bosarge suddenly argued that he only "acted as the President and employee of Superior Builders and Developers, Inc." His attorney argued to the trial court that "Mr. Bosarge was never sued in his individual capacity" and "was never named in his individual capacity." Superior Builder's attorney likewise insisted that the contract was not between Bosarge individually and Hartzler, but between Hartzler and the company itself.

¶47. Yet these arguments were never made to the arbitrator. Indeed, Superior Builders' attorney presented an inventive but completely new argument not anywhere apparent on the face of the arbitration award, which was that Bosarge was

> not a d/b/a. He has never been a d/b/a. One of the reasons that I think the arbitrator's award was styled in the fashion that it was, was to remedy the fact

> that the style of the case as originally filed by the plaintiff said d/b/a, and it is not a d/b/a. *That discussion was had*. So it is only the incorporated entity and that was the only entity there defending anything.

(Emphasis added). Counsel for Superior Builders then presented arguments based on this theory. One argument was that the arbitrator somehow knew this was an incorrect way to refer to the defendant Bosarge, but nonetheless allowed the Interim award and the Final award to be written that way. Because the record of the arbitration was not made part of the trial court record, there is no way to confirm this theory. Nonetheless, there is nothing on the face of the arbitration awards that reflect this interpretation of Bosarge's identity. As such, we are bound to find that these arguments were presented for the first time in the circuit court. Therefore, the arguments cannot be the basis for modification of the award.

¶48. In accord with *Caldwell*, these new arguments which were never before presented to the arbitrator, and not present on the face of the arbitration award or in the arbitration record, should have been excluded from the circuit court's consideration. In entertaining these new arguments and entering into a fact-finding phase as to the identity of the "proper" defendant, the trial court exceeded its jurisdiction. We reverse on these grounds.

III. The request for modification was untimely.

¶49. Where a party fails to file an application to modify an arbitration award within the statutory ninety days, the motion is time-barred. Miss. Code Ann. § 11-15-135(1)(a) (an award may only be modified when sought "within ninety (90) days after receipt of a copy of the award").[2]

[2] The statute further provides a few distinct ways by which an arbitration award may be modified–both with clear timelines. For example, a party could ask an arbitrator to

¶50. The Supreme Court has held that where a party fails to file an application to modify an arbitration award within the statutory ninety days, the motion is time-barred. *Johnson Land Co. v. C.E. Frazier Const. Co.*, 925 So. 2d 80, 83 (¶8) (Miss. 2006). For "[t]he statutory language is mandatory, not discretionary." *Id*. Likewise, we have found an objector's "failure to file an action to vacate the arbitration award in a timely manner bars his opposition to [a] motion to confirm the arbitration award and for entry of a judgment." *Wells Fargo Advisors LLC v. Runnels*, 126 So. 3d 137, 142 (¶17) (Miss. Ct. App. 2013).

¶51. In this case, Bosarge sought to attack the judgment confirming the arbitration award under Mississippi Rule of Civil Procedure 60. However, Supreme Court precedent and statute provides the only route available to seek to modify an arbitration award, and the time period is limited to "within ninety (90) days after receipt of a copy of the award." Miss. Code Ann. § 11-15-135 (1)(a). As a result, the trial court should not have considered the merits of Bosarge's request for modification, as it was time-barred by well over a year and a half.

¶52. The final award was signed on August 21, 2017; Bosarge did not seek to modify its application to him until April 30, 2019. Accordingly, his request was untimely and should

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modify or correct an award if there was a miscalculation or mistake in the award, provided they do so "within twenty (20) days of the receipt of the award." Miss. Code Ann. § 11-15-123 (Rev. 2019). A party could also ask for the award to be vacated by a circuit court in certain extreme circumstances, such as "corruption, fraud or other undue means." Miss. Code Ann. § 11-15-133(1)(a) (Rev. 2019).

Important to this case, state law also allows a circuit court to "modify or correct the award" if "[t]here is an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award[.]" Miss. Code Ann. § 11-15-135(1)(a). However, this remedy is only available when sought "within ninety (90) days after receipt of a copy of the award[.]" *Id*.

not have been considered by the trial court. *See also Runnels*, 126 So. 3d at 142 (where the untimely request to modify constituted "reversible error" requiring the Court of Appeals to "render judgment in favor of" the party seeking confirmation of the arbitration award).

CONCLUSION

¶53. The Supreme Court has declared we are to favor both arbitration and the confirmation of arbitration awards. "A defining characteristic of arbitration is its finality and the binding disposition of a controversy." *Caldwell*, 242 So. 3d at 98 (¶13). "Parties to an arbitration enter the process knowing that the arbitrator's award will signal the factual end of their dispute, rather than leaving open the door to the possibility of future appeals." *Id*. As the Court emphasized, this dramatically limits what a circuit court does when faced with a motion to confirm an arbitration award: "courts asked to review, confirm, or modify an arbitrator's award do so through an extremely limited lens." *Id*.

¶54. Looking beyond this "extremely limited lens," such as by allowing extensive litigation over the amendment of an arbitration award, "open[s] the door to the boundless legal and evidentiary appeals that can render informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process, and bring arbitration theory to grief in post arbitration process." *Id*. (cleaned up).

¶55. In accord with this public policy, precedent, and statute, we accordingly reverse and render the trial court's modification of the order confirming the arbitration award. We reverse and render to reinstate the April 30, 2018, judgment confirming the final arbitration award in its entirety.

¶56. **REVERSED AND RENDERED.**

BARNES, C.J., WILSON, P.J., WESTBROOKS, McDONALD AND SMITH, JJ., CONCUR. CARLTON, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION, JOINED BY GREENLEE, J. LAWRENCE AND EMFINGER, JJ., NOT PARTICIPATING.

CARLTON, P.J., DISSENTING:

¶57. I find that the circuit court was within its discretion to modify its judgment to clarify that Bosarge, individually, was not a party to the Contractor Agreement and therefore he did not submit to arbitration. Because I would affirm the circuit court's judgment, I respectfully dissent.

¶58. The Mississippi Supreme Court has held that "the scope of judicial review of an arbitration award is quite narrow, and 'every reasonable presumption will be indulged in favor of the validity of arbitration proceedings.'" *D. W. Caldwell Inc. v. W.G. Yates & Sons Constr. Co.*, 242 So. 3d 92, 98 (¶13) (Miss. 2018) (quoting *Wilson v. Greyhound Bus Lines Inc*., 830 So. 2d 1151, 1155 (¶9) (Miss. 2002)). However, motions filed pursuant to Mississippi Rule of Civil Procedure 60(b) "are generally addressed to the sound discretion of the trial court[,] and appellate review is limited to whether that discretion has been abused." *Simmons v. Simmons*, 58 So. 3d 1239, 1243 (¶12) (Miss. Ct. App. 2011) (quoting *Stringfellow v. Stringfellow*, 451 So. 2d 219, 221 (Miss. 1984)).

¶59. As stated by the majority, this appeal stems from a Contractor Agreement between Hartzler and "Randy Bosarge of Superior Builders & Developers Inc. [(SBD)]." Hartzler sued "Randy Bosarge d/b/a [SBD]" for breach of contract, breach of warranty, and negligent construction. Per the Contractor Agreement, the parties submitted the matter to arbitration.

The arbitrator determined that Hartzler was entitled to a judgment against "Randy Bosarge/[SBD]" and awarded Hartzler monetary damages. Upon Hartzler's motion, the circuit court entered a judgment confirming the arbitration award.

¶60. After enrollment of the judgment, Hartzler attempted to garnish the wages of Bosarge, individually, to recover the damages awarded by the result of arbitration. Bosarge then filed a motion to quash the writ of garnishment and to modify the circuit court's judgment to clarify that the judgment was only against SBD, and not Bosarge, individually. In his motion to modify, Bosarge argued that the judgment was entered against a party described as "Randy Bosarge/[SBD]" and that Hartzler erroneously interpreted that party to include Bosarge, individually. Bosarge explained that the Contractor Agreement "clearly indicates the builder of the home was a valid Mississippi corporation, [SBD], which is referred to as the '[C]ontractor' and the agreement was signed by Randy Bosarge, the [p]resident of the corporation." The circuit court found that Bosarge, individually, was not a party to the Contractor Agreement and accordingly granted Bosarge's request to modify the judgment.

¶61. I recognize that with respect to arbitration agreements stemming from construction contracts, like the matter before us, our statutory law grants jurisdiction over motions to modify arbitration awards to the circuit court of the county in which the arbitration award was issued. Miss. Code Ann. § 11-15-101 (Rev. 2019);[3] Miss. Code Ann. § 11-15-129 (Rev.

[3] Mississippi Code Annotated section 11-15-101 states that sections 11-15-101 through 143 of Mississippi's Arbitration Act apply "to any agreement for the . . . engineering, construction, erection, repair or alteration of any building, structure, fixture, . . . or any part thereof . . . ." In the case before us, the underlying dispute concerns a contract for the construction of a home; therefore, "the laws under this section control the discussion below." *D. W. Caldwell*, 242 So. 3d at 98 (¶12).

2019).[4] However, the supreme court has stated that "a circuit court has no authority to modify a construction-related arbitration award unless the exceptions outlined under Mississippi Code [s]ection 11-15-135(1) . . . and (2) . . . are met. *D. W. Caldwell*, 242 So. 3d at 98 (¶13).

¶62. I agree with the majority that section 11-15-135 requires a party to the arbitration to file its motion to modify "within ninety (90) days after receipt of a copy of the award." Miss. Code Ann. § 11-15-135 (Rev. 2019). Hartzler argues on appeal that when seeking to modify the arbitration award, Bosarge failed to file his motion pursuant to the procedure and requirements set forth in section 11-15-135; specifically, Bosarge failed to raise any of the statutory grounds for modifying an arbitration award and he failed to file his motion within ninety days after the receipt of a copy of the arbitration award. The supreme court has held that where a party fails to file an application to modify an arbitration award within the statutory ninety days, the motion is time-barred. *Johnson Land Co. v. C.E. Frazier Const. Co.,* 925 So. 2d 80, 83 (¶8) (Miss. 2006); *see also Wells Fargo Advisors LLC v. Runnels*, 126 So. 3d 137, 142 (¶15) (Miss. Ct. App. 2013). However, Bosarge maintains that he,

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[4] Mississippi Code Annotated section 11-15-129 sets forth as follows:

> The term "court" as used in Sections 11-15-101 through 11-15-143 means the circuit court of the county as provided in Section 11-15-131. The making of an agreement or provision for arbitration subject to Sections 11-15-101 through 11-15-143 and providing for arbitration in this state shall, whether made within or outside this state, confer jurisdiction on the court to enforce the agreement or provision under Sections 11-15-101 through 11-15-143 and to enter judgment on an award duly rendered in an arbitration thereunder and to vacate, modify or correct an award rendered thereunder for such cause and in the manner provided in Sections 11-15-101 through 11-15-143.

individually, was not a party to the Contractor Agreement containing the arbitration clause—rather, the contract was between Hartzler and SBD.

¶63. The supreme court has held that the procedural rules of an arbitration act do not apply to those who are not a party to the contract containing the arbitration clause.[5] *See Linde Health Care Staffing Inc. v. Claiborne Cty. Hosp*., 198 So. 3d 318, 322 (¶20) (Miss. 2016). In *Linde*, the supreme court discussed an arbitration award stemming from a dispute over the terms of an employment contract between Linde Health Care Staffing Inc. (Linde) and the Claiborne County Hospital. *Id*. at 320 (¶5). The employment contract contained an arbitration clause stating that the parties would "submit to binding arbitration . . . should any disputes arise from the agreement." *Id*. After a dispute arose over payment, Linde received a favorable arbitration award stating that the Claiborne County Hospital owed Linde damages. *Id*. at 321 (¶11). Linde then obtained a judgment from the circuit court confirming the arbitration award. *Id*. at (¶12). The Claiborne County Hospital subsequently filed a Rule 60(b) motion to vacate the judgment confirming the arbitration award, arguing that "the arbitration award was based on a contract to which Claiborne County Hospital was never party." *Id*. at (¶14). Linde responded that because the Claiborne County Hospital failed to

[5] I recognize, however, that "a nonsignatory party may be bound to an arbitration agreement if so dictated by the ordinary principles of contract and agency." *Freese v. Mitchell*, No. 2012-CA-01045-SCT, 2014 WL 1946593, at *9 (¶38) (Miss. May 15, 2014) (quoting *Miss. Care Ctr. of Greenville LLC v. Hinyub*, 975 So. 2d 211, 216 (¶11) (Miss. 2008)). "Six theories for binding a nonsignatory to an arbitration agreement have been recognized: (a) incorporation by reference; (b) assumption; (c) agency; (d) veil-piercing/alter ego; (e) estoppel; and (f) third-party beneficiary." *Id*. (quoting *Bridas S.A.P.I.C. v. Turkmenistan*, 345 F.3d 347, 356 (5th Cir. 2003)). However, Hartzler failed to raise any of these arguments before the circuit court, and I therefore decline to address them. *See id.* at (¶39).

file a motion to vacate the arbitration award within ninety days of receiving notice of the award, pursuant to the Federal Arbitration Act's procedural rules, the Claiborne County Hospital's Rule 60(b) motion was therefore time-barred. *Id*. at 322 (¶19).[6]

¶64. On appeal, the supreme court determined that the Claiborne County Hospital was not a party to the contract with Linde. *Id*. at 323 (¶22). The supreme court held that because the Claiborne County Hospital "never entered into any agreement with Linde[,]" it therefore never agreed to submit to arbitration. *Id*. The supreme court posed the question: "How can the [Claiborne County] Hospital be bound by the [arbitration act's] procedural rules if it never entered a contract with an arbitration clause?" *Id*. at 322 (¶20). The supreme court then answered that because the Claiborne County Hospital was not a party to the contract, "it cannot" be bound by the procedural rules of the arbitration act. *Id*. The supreme court reiterated that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Id*. at (¶21) (quoting *AT&T Techs. Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648 (1986).

¶65. Relevant to the matter before us, the *Linde* court held that "whether the parties agreed to arbitrate is a question for the court, not the arbitrator." *Id*. As stated, the circuit court in this case granted Bosarge's motion to modify the judgment after finding that Bosarge "is not

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[6] In *Linde*, the judgment confirming the arbitration award constituted a foreign judgment, and Linde therefore argued that the arbitration award at issue was subject to the procedural rules of the Federal Arbitration Act—not Mississippi's procedural rules. *Id*. at 322 (¶18). For purposes of discussion, I recognize that both the FAA and Mississippi's Arbitration Act contain provisions stating that motions to vacate arbitration awards must be filed in the court where the award was made within ninety days of notice of the arbitration award. *See* 9 U.S.C. §§ 10, 12 and Miss. Code Ann.§ 11-15-135. I therefore find the supreme court's analysis in *Linde* instructive to the case at hand.

and was not a party to the lawsuit or to the arbitration proceeding which led to the judgment, therefore the judgment does not apply to him." I recognize that "[t]he decision to modify a prior order under Rule 60(b) is a matter within the trial court's sound discretion." *Collins v. Collins*, 188 So. 3d 581, 585 (¶10) (Miss. Ct. App. 2015). I therefore turn to examine whether the circuit court abused its discretion in finding that the arbitration award does not apply to Bosarge, individually.

¶66. Bosarge asserts that he filed his motion seeking to modify or amend the judgment confirming the arbitration award pursuant to Rule 60(b)(6), which allows a trial court to modify a final judgment for "any other reason justifying relief from the judgment." M.R.C.P. 60(b). As to the timeliness of Bosarge's motion, the record reflects that Bosarge filed his motion to modify the judgment exactly one year after the entry of the judgment confirming the arbitration award. Bosarge maintains that because his motion to modify the judgment falls under subsection 6 of Rule 60(b), he was not subject to Rule 60(b)'s six-month time requirement for filing motions. "Although "[a] six-month time-bar applies to reasons [set forth in Rule 60(b)](1)-(3), . . . motions brought under (4)-(6) must be filed within 'within a reasonable time.'" *Collins*, 188 So. 3d 581, 585 (¶9). The supreme court has held that "[t]he determination of whether a Rule 60(b)(6) motion has been made within a reasonable time is considered on a case-by-case basis." *Carpenter*, 58 So. 3d at 1162 (¶18) (citing M.R.C.P. 60(b)). Bosarge asserts that his first notice that any individual claim was made against him was upon receiving notice that his wages would be garnished. Bosarge maintains that within five days of receiving the notice of garnishment, he filed the motion to quash the

garnishment and to modify the circuit court's April 30, 2018 judgment confirming the arbitration award.

¶67. Furthermore, Rule 60(b)(6) "is a catch all provision to allow relief when equity demands." *Collins*, 188 So. 3d at 585 (¶10) (quoting *Townsend v. Townsend*, 859 So. 2d 370, 375 (¶16) (Miss. 2003)). The supreme court has provided the following relevant factors to examine when adjudicating a Rule 60(b)(6) motion:

> (1) That final judgments should not lightly be disturbed; (2) that the Rule 60(b) motion is not to be used as a substitute for appeal; (3) that the rule should be liberally construed in order to achieve substantial justice; (4) whether the motion was made within a reasonable time; (5) relevant only to default judgments; (6) whether[,] if the judgment was rendered after a trial on the merits[,] the movant had a fair opportunity to present his claim or defense; (7) whether there are intervening equities that would make it inequitable to grant relief; and (8) any other factors relevant to the justice of the judgment under attack.

Carpenter v. Berry, 58 So. 3d 1158, 1162 (¶18) (Miss. 2011) (quoting *M.A.S. v. Miss. Dep't of Human Servs*., 842 So. 2d 527, 530 (¶16) (Miss. 2003)).

¶68. The record reflects that in support of his motion to modify the judgment, Bosarge argued that executing a judgment against him, individually, when no claim was ever made against him, justifies the circuit court relieving him as a party from the judgment. In his appellate brief, Bosarge also addressed the above factors set forth in *Carpenter* that a trial court must examine when adjudicating a Rule 60(b)(6) motion:

> First, the final judgment will not be disturbed. Clarification that the judgment is against not Randy Bosarge, individually, will in no way affect the judgment against [SBD]. Second, there are no issues for which his motion is being used to circumvent the appeal process. Third, substantial justice will certainly be served by clarifying the judgment is not against Randy Bosarge, individually. Without such clarification, a party against whom no claim was made will be

> subject to a garnishment unjustly executed against him. Fourth, the motion was made within a reasonable time . . . . Fifth, this was not a default judgment. Sixth, the movant had no opportunity to present his claim or defense for himself individually. The underlying arbitration was against [SBD] and defense was made for that entity only. Seventh, there are no intervening equities and it is equitable to grant the relief sought by Mr. Bosarge.

¶69. The circuit court held a hearing on Bosarge's motion to modify the judgment and Hartzler's motion in opposition. At the hearing, Bosarge maintained that he, as an individual, was not a party to the Contractor Agreement.[7] Hartzler argued, however, that the Contractor Agreement states that it was made "by and between Randy Bosarge of [SBD], [and] not on behalf of [SBD]." Hartzler asserted that "the lawsuit is actually against Randy Bosarge. . . . [and] [a]lways has been since 2013." Hartzler explained that the first amended complaint was filed against "Randy Bosarge d/b/a [SBD]" and he argued that "when you sue somebody d/b/a, you're suing the person." Hartzler further claimed that "d/b/a" meant Bosarge was a party, and not some other entity.

¶70. Hartzler also argued that after receiving the complaint against him, Bosarge should have filed a motion pursuant to Mississippi Rule of Civil Procedure 12(b)(6) seeking to dismiss Bosarge, individually, as a party to the action. Hartzler maintained that a Rule 12(b)(6) motion must be filed as an affirmative defense and that because Bosarge failed to file such a motion in a timely manner, he therefore waived this defense.

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[7] SBD is not a party to this appeal; however, they filed an amicus brief asserting that "[i]t is . . . clear that the only parties to the contract were identified as 'Contractor' and 'Owner.'" SBD asserts that Hartzler is identified as the "owner" in the very first paragraph of the contract, and "Randy Bosarge of Superior Builders and Developers, Inc." is identified as the contractor. SBD states that the contract was signed by "Randy Bosarge - President." SBD maintains that because Bosarge was not a party to the contract, no "clear and unmistakable" evidence exists to show that he agreed to subject himself to arbitration.

¶71. After hearing arguments from the parties and reviewing the evidence, the circuit court found that "the whole lawsuit really was against [SBD,]" and not Bosarge, individually. The circuit court therefore held that the judgment "was improper from the get go when [it was] entered." As to the timeliness of Bosarge's motion, the circuit court found that based on the evidence, "this only came to light when [Hartzler] tried to garnish Mr. Bosarge's salary, personally. That's when everybody realized, whoa, something is wrong here." The circuit court also held that Bosarge "is not and was not a party to the lawsuit or to the arbitration proceeding which led to the judgment, therefore the judgment does not apply to him." The circuit court then entered its order modifying the judgment to state that the arbitration award was only against SBD.

¶72. "Whether a contract is ambiguous is a question of law for the court to determine and if it is not, the contract should be enforced as written." *Bissette v. Univ. of Miss. Med. Ctr.*, 282 So. 3d 507, 514 (¶15) (Miss. Ct. App. 2019). In determining whether the contract is ambiguous, "the court 'must review the express wording of the contract as a whole.'" *Id*. (quoting *Epperson v. SOUTHBank*, 93 So. 3d 10, 16 (¶17) (Miss. 2012)). The supreme court has held that "[t]he mere fact that the parties disagree about the meaning of a contract does not make the contract ambiguous as a matter of law." *Id*. (quoting *Royer Homes*, 857 So. 2d at 753 (¶10)). If the court finds that "no ambiguity exists, this Court will accept the plain meaning of the instrument as the intent of the parties." *Id*.

¶73. After reviewing of the transcript and the circuit court's order granting Bosarge's motion, I find no evidence showing that the circuit court found the Contractor Agreement

ambiguous as to the identification of the parties to the agreement. My review of the Contractor Agreement reflects that Bosarge signed the agreement in his capacity as the president of SBD, and not as Bosarge, individually.[8] The Contractor Agreement lists the contracting parties as Hartzler and "Randy Bosarge of [SBD], hereinafter called the Contractor." The contractor is again named as "Randy Bosarge, [SBD,]" and the agreement is signed by "Randy Bosarge - President" on the line for the signature of the contractor or contractor's agent. I find no specific language in the Contractor Agreement to state that Bosarge, individually, was a party to the agreement.

¶74. As stated, the agreement to arbitrate was contained in the Contractor Agreement. Because Hartzler and SBD were the only parties to the Contractor Agreement, they were the only two parties whose disputes could have been resolved by the arbitrator. I therefore find that Bosarge, individually, did not submit to arbitration. Furthermore, Hartzler filed his complaint against "Randy Bosarge d/b/a [SBD]" and alleged that "[SBD] was negligent." The complaint contained no allegations against Bosarge, individually. The majority opinion

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[8] *Cf. Brown v. Waldron*, 186 So. 3d 955, 959 (¶10) (Miss. Ct. App. 2016). In *Brown*, Tom Brown and Shannon Brown bought a home built by "Waldron Properties LLC." *Id*. at 957 (¶1). After noticing cracks in the wall of the home, "the Browns notified Murray Waldron, the sole member of Waldron Properties," of the defects. *Id*. at (¶2). The Browns eventually filed suit against "Waldron d/b/a Waldron Properties LLC (WP)" for negligence and breach of warranty. *Id*. The Browns argued that "Waldron is personally liable for the defects since he built the home, not WP." *Id*. at 959 (¶9). In support of their argument, the Browns asserted the following: on the document entitled "Notice to Home Buyer of the New Home Warranty Act," Waldron signed *his* name, not WP, on the "seller" line; Waldron used his personal cell phone to conduct business; and Waldron never mentioned to the Browns that WP was the actual builder. *Id*. On appeal, this Court found that "it is clear that Waldron was not the builder of the Browns' home—WP was the builder." *Id*. at (¶10). This Court explained that "[a]ll of the documents, save the Notice [to Home Buyer of the New Home Warranty Act], indicate WP was the builder." *Id*.

admits that Mississippi caselaw has not directly addressed whether the term "d/b/a" means the individual including the company.

¶75. After my review, I find that the circuit court did not abuse its discretion in granting Bosarge's Rule 60(b)(6) motion and modifying its prior judgment. *See Collins*, 188 So. 3d at 585 (¶10). Accordingly, I would affirm the circuit court's judgment.

GREENLEE, J., JOINS THIS OPINION.